Moral Certainty and Proof beyond a Reasonable Doubt in Witchcraft Trials

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INTRODUCTION

One hundred and fifty eight years after nineteen people were murdered in Salem on the charge of witchcraft; the Supreme Judicial Court of Massachusetts stated that the burden of persuasion on the prosecution requires proof of the charge against the accused beyond a reasonable doubt. Chief Justice Shaw said that:

> "… [T]he circumstances taken together should be of a conclusive nature and tendency, leading… to a satisfactory conclusion, and producing … a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. … It is essential, therefore, that the circumstances taken as a whole … should to a moral certainty exclude every other hypothesis. The evidence must establish the *corpus delicti*, as it is termed, or the offence committed as charged; ... This is to be proved beyond reasonable doubt. Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. … [I]f the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."[1]

The Court has expressed its understanding of reasonable doubt as being tied to moral certainty in more words than have been set out here but never stated where the idea came from and where it had previously been applied nor what moral certainty is. This is the subject matter of this paper. Because this decision was made by the highest court of the state of Massachusetts,

[1] *Commonwealth v. Webster*, 59 Mass. 295, 319-20 (Mass. 1850); Per Shaw, C.J. for the Court (with Justices Wilde, Dewey and Metcalfe).

it is easy to assume that the witchcraft trials of Salem Massachusetts may have created the need for the standard but research has revealed that the standard may have arisen as a corollary of the Jury's role to the Judge's 17th Century role of prosecutor in Witchcraft trials.

Two professors who have made substantial contributions to the law in this area are James Whitman and Barbara Shapiro. While James Whitman traced the origins of the reasonable doubt standard to 1780 in Jury instructions, Barbara Shapiro found the first evidence of the use of "doubt" in a 1777 case in a closing argument by counsel to the Jury. Taking Shapiro's approach, a search for the word doubt reveals that there was doubt as a standard applied in trials as far back as 1620 in England, and in the witchcraft trials of Massachusetts.

Coke's reports purported to record the trials within the reign of James I from 1603 but do not contain any witch trials so I have had to resort to transcripts from secondary sources to obtain the trial records.[2] William Gemmill's work reproduces the trial transcripts in modern English and hence have been used in this analysis but, it should be noted that William Gemmill's statement that Witchcraft became a statutory offense under James I in 1603[3] is wrong because the first Witchcraft Statute was passed by King Henry VIII, repealed by King Edward, and in 1562, Queen Elizabeth re-codified witchcraft as a felony.

King James's contribution to the statute titled "An Act against the Conjuration, Witchcraft and Dealings with Evil and Wicked Spirits"[4] was to more severely punish the crime

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[2] Gemmill, William Nelson. *The Salem Witch Trials: a chapter of New England History.* Chicago, 1924; http://galenet.galegroup.com/servlet/MOML. pp.'s 54-202.

[3] *Id.,* P.2.

[4] 5 Eliz. C. 15, Statutes of the Realm, A.D. 1562-63. See, 1 Jac. I. c. 12, para.'s II & III. In more severely punishing witchcraft, James I eliminated the imprisonment penalty for the first time offenders which was one year on the first offence with a quarter-annual public confession by the witch in a public place. He did however retain one year imprisonment for the offence, if the act of witchcraft was used to find lost or stolen treasures and things and public confessions within the year for a space of 6 hours at every fair held in that city.

of witchcraft by requiring imposition of the death penalty. The crime has its origins in the Bible.[5]

A key note scholar of the History of the English Common Law, Professor John Langbein, presenting the growth of defensive safeguards in the history of criminal procedure,[6] discussed one of the cases used in Whitman's book on the origins of reasonable doubt and stated that the emergence of the beyond-reasonable-doubt standard was not only a further safeguard for the accused, but was also a factor that reinforced the growing disinclination of the accused to speak at trial regarding the merits of the charges.[7] Whitman's book traces the origins of this standard to the *Sessions Papers* reports showing judicial instructions focusing on reasonable doubt to the 1780's.

This paper establishes that they were actions taken in times of doubt by the courts in 16th Century England that show a recognition of doubt and actions taken due to uncertainty, that may be the origin of the standard. It proposes to analyze the application of the standard, within the limited scope of witchcraft as a felony punishable with death. Interestingly, since the reasonable doubt standard requires jury conviction to a moral certainty, the requirement of doubt as defined today, fails to take into consideration the origin of moral certainty being the Moral Code. Thus the difficulty of applying the standard in modern day United States cases arises from the division between church and state which is merged in England. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state."[8]

I propose that moral certainty may not be a good modern test in the United States unless

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[5] Exod. 22:17

[6] Langbein, J.H. et al. *History of the Common Law: The development of Anglo-American Legal Institutions*. Aspen Pub. 2009, pp. 696-98.

[7] *Id.*, Langbein, at 698.

[8] *Lee v. Weisman*, 505 U.S. 577, 600-01; 112 S. Ct. 2649, 2662 (1992).

the provisions of temporal law from whence the test arose are applied. Being impossible to do this, a more apt test may be conviction to a rational certainty so as to eliminate the morality aspect of the test embedded in the reasonable doubt standard.

A. Crime of Witchcraft

I. Translation of Beliefs into Concrete Normative Values

Normative values translated from religious beliefs to concrete normative order. Neil MacCormick,[9] who is a Professor of Law, wrote about the importance of understanding the idea of normative order which gives each member of society ways to differentiate right from wrong in what we do, of having common or over-lapping conceptions of what one ought to do in various recurring situations.[10] He wrote that people "are norm-users, whose interactions with each other depend on mutually recognizable patterns that can be articulated in terms of right versus wrong conduct, or of what one ought to do in a certain setting."[11] Since, according to MacCormick, understanding this use of norms precedes understanding any possibility of deliberately creating relevant norms that are to become patterns of behavior, and these norms can be deliberately created so as to transition into institutional normative order, which is law or the practice thereof, then *a fortiori* norms based on religious teachings can also be institutionalized and have been.[12] Witchcraft, being a biblical offense, norms most likely affected the kind of evidence required to prove the offense as understood by the 17th Century juror.

Thus to appreciate the 16th Century Jury, there is a necessity to travel through the

[9] Neil MacCormick, Formerly Regius Professor of Public Law and the Law of Nature and Nations, the University of Edinburgh.

[10] Neil MacCormick. *Institution of Law.* Oxford Univ. Press, Northants, Great Britain, 2008. Pp. 20.

[11] *Id.*

[12] *Id.*

doctrines that arose from the Bible wherein it was a sin to let a sorceress live[13]. These Christian beliefs or norms became concrete influences on juror perception of the testimony of witnesses. During the reign of King James I, witchcraft which had been a crime in England under Queen Elizabeth, was so abhorred that even after a witch was executed, it was deemed that her punishment continued in hell and those who thought her innocent or repentant would seek pardon for her after-life.[14] In his treatise on the execution of Marie Smith in 1615, "written for the benefit of all Christians that they may consider the ramifications of witchcraft," one Alexander Roberts who sought to justify proof of the crime of witchcraft, because the statute did not provide practicable elements, may have set a standard for the kind of character and evidence to be considered in trying an accused person.[15]

This is probably why the Quarter Sessions Papers interestingly point to the fact that certain articles perhaps like that of Alexander Roberts give the impression that the elements of the law against witchcraft may have been set in motion by the people rather than the crown.[16] It also shows that the Stewarts, who were servants of the Church of England, and not the Puritans, were the originators of the punishments for immorality, which formed some of the conduct considered to be exhibited by witches.[17] The Puritans however, carried these practices with them in their travels to America.

In 1616, Alexander Roberts who styled himself, Preacher of God's word at Kings-Lynne,

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[13] Exod. 22:17, The New American Bible. Catholic Parish Edition. Catholic Bible Pub. Wichita, Kansas. Nihil obstat, Stephen Hartdegen, Imprimatur, Patrick Cardinal O'Boyle, 1970. Pp. 68.

[14] Roberts, Alexander. *A treatise of Witchcraft.* Printed by N.O. Samuel Man. London, 1616. Pub. Project Rutenberg at http://www.archive.org/atreatiseofwitch17209gut. Though, there was the issue of forfeiture of property that motivated family members to plead for pardon or compensation even after execution.

[15] *Id.*

[16] Compiled by J.W. Willis Bund. *Calendar of the Quarter Sessions Papers*. Vol. I., 1591-1643, Compiled for the Records & Charities Committee. Division I., Pp. 140.

[17] *Id.*

Norfolk[18], purported to set a standard for behavior that would constitute witchcraft which he had considered in analyzing the trial of Marie Smith. He distinguished Atheists from Witches.[19] He considered witches to be mostly women, persons with a dull and slow wit, over-incredulous, believing everything, especially when they are carried by the violent tempest of their desires and other governed affections.[20] He believed that it is to this quality that the devil "usually spreads his nets"[21]. Accordingly, he argued to the other judge and jurors that the devil waits for these people to grow discontented and desperate, through want and poverty, or be exasperated with a wrathful and unruly passion of revenge, or transported by the insatiable love to obtain something they desire.[22] The devil then purportedly takes advantage of them and "assaults them with golden and glorious promises, to perform unto them the wishes of their own hearts"[23].

The Judge and jurors to whom he sent this letter, "the right worshipful John Atkins, Mayor," and five others listed therein, who may have been jurors on the trial of Marie Smith, replied giving nine[24] propositions as to why witches should not be spared. Interestingly, the response set out some elements of what had to be established in a trial for witchcraft including the fact that "there would be an infinite number of witnesses and what physical evidence was to be sought after."[25]

a. Physical Evidence

[18] Kings-Lynn is still a town in Norfolk, England.

[19] Roberts. *A Treatise of Witchcraft (E-book).*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

The first of these standards for proof of the crime of witchcraft deduced from these judges and jurors beliefs was the requirement for specific physical evidence. The jurors described this physical evidence as some scratch which the devil gives to the witch and through which the witches could be identified.[26] They alleged that the scratch remains full of pain and anguish until the devil's return, at which time the devil numbs the scratch so that though the scratch is pierced with any sharp instrument, it is without any sense of feeling and will not yield one drop of blood at all, a matter known by (i) just, (ii) often and (iii) due trial. The necessity for constancy or oftenness in examining those accused of witchcraft is subtly stated here but was actually applied in the case of Bridget Bishop, tried and acquitted the first time, then tried, convicted and executed the second time though no physical markings were found on her. That they were trials held for each person accused of witchcraft satisfies the requirement for due trial but the justness of the trial is another matter.

Subsequently, in the propositions, the writers admitted that regular standards for determining the commission of the crime of witchcraft could not be used. Hence, because the "devil taught the witches sooth-saying, auguration, necromancy etc. whose art is such a hidden mystery of wickedness and so unsearchable a depth of satan that neither the secrets of the one can be discovered, or the bottom of the other further sounded, then either the *practisers* thereof themselves by their own voluntary confessions made, or procured by order of justice according to the manner of that country where they be questioned have knowledge or is manifested by the sundry mischief done of them unto others, proved by impartial testimonies upon oath, and by vehement presumptions confirmed, or else communicated unto us in the learned treatises, and

[26] *Id., Treatise of Alexander Roberts, para. 15.*

discourses of ancient and late writers gathered from the same grounds." [27]

In Salem, Physical evidence was sought after in every trial before an indictment and the test was the same as described by the Treatise on Witchcraft. In the cases of George Burroughs and George Jacobs, Jr., Jurors Ed Weld, Will Gill, Tom Flint and Tom West were sworn to carry out a physical examination on both accused persons.[28] They found nothing upon the body of George Burroughs but found "what is unnatural" on George Jacobs and like Roberts Treatise states, the test for the mark being unnatural was that they ran a pin through two of the marks and George Jacobs felt nothing.[29] The marks were located in his mouth, inside his right shoulder and upon his right hip.[30] In the case of Rebecca Nurse, the nine female Jurors alleged that they found an unnatural mark in an unspeakable part of her anatomy.[31] In the first physical examination of Bridget Bishop which took place at Noon, the female jurors alleged that they found an unnatural mark in the same location on the Bridget Bishop's anatomy as they did, on that of Rebecca Nurse but when they conducted a second examination that of Bridget Bishop had disappeared.[32]

b. Witnesses

Meeting the standard of proof was assumed to be easy because of the presumption that there would be an unlimited number of witnesses whose testimony will dispel any doubt in the minds of the jurors. In the first proposition, it was suggested that witnesses at these trials would be "almost infinite" and therefore it shall be sufficient to produce some few choice and selected witnesses. This underlies the point that if there was no standard of proof beyond some doubt, it would not have been necessary to make such a presumption.

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[27] Roberts. *A Treatise on Witchcraft, "A Treatise on the confessions and Execution of Marie Smith wife of Henrie Smith"* para. 3.

[28] *Salem Witchcraft Papers, Vol. I. Trial of George Burroughs and George Jacobs.*
[29] *Id.*
[30] *Id.*
[31] *Salem Witchcraft Papers, Vol. I & II, Physical Examination of Rebecca Nurse and Bridget Bishop.*
[32] *Id.*

On the other hand, the lack of a procedure for discrediting the witnesses did not conform well to doubt because of the presumption of a demonic voice. Hence, testimony by the accused was not admissible to discredit these witnesses because the devil was assumed to be able to "speak the name of God, and nevertheless were still devils, and when they said unto Christ, they knew who he was the holy one of God in Mar. 1, 24, 25, their mouths were stopped, he would [have] no such witness, that we should learn not to believe them when they say the truth, for this is but a bait, that we might afterward follow their lies."[33] "There is much mention made of these, both in the civil and canon laws, and diversity of punishment allotted out for them so that none can doubt that there hath been and are such."[34] In essence, because these persons are accused of witchcraft and their discontentment shown, none can doubt that these executed persons were witches. But notice that the accusers were required to show discontentment hence leading to the conclusion that there was a standard of proof even in this trials. Proof to a moral certainty would therefore require proof of discontentment.

c. Elements of Discontentment

To eliminate doubt therefore, the key element of witchcraft seemed to be a showing of discontentment for which the witches could not demure.[35] This was however not the only element and did not apply to all accused persons. In response to Roberts's description of susceptible characters, the judge and jurors responded that his assertion that witches were dull and slow witted and were only women was incorrect.[36] Women were not the only person's potentially capable of witchcraft. Thus it was not the gender of the accused but a certain state of

[33] *Id.*, Para. 8.

[34] *Id.*

[35] *See* Para. II and 46.

[36] *Id.*

being that made a person a potential witch. They agreed with Roberts test that such personalities are shown to exhibit discontentment.[37] They proposed four ways to show discontentment that would amount to an accusation for witchcraft.[38] These were a showing of malice, envy, hatred and "banning and cursing".[39] This came as part of the reasons why Marie Smith was deemed to have entered into a contract with the devil.[40]

Evidence that could eliminate doubt in the minds of jurors to convict an accused person is exemplified in Marie Smith's trial and subsequently in the trials held in Salem Massachusetts. According to theses jurors, because of Marie Smith's discontentment with her neighbor's turning a profit in their sale of cheese when she could not, (probably after a lot of torture based on the tying and dumping in the water test as established by James I's Demonology) Marie Smith purportedly confessed to the devil appearing to her in the shape of a Black man who promised to avenge her if she would continue in her discontent, showing malice, envy, hatred, banning and cursing, and promising that she would forsake God and depend upon the devil.[41]

Thus the basis for mandatory condemnation was the religious belief of the jurors and judge because part of the elements of the crime was a promise to the devil to forsake God. Atkins and the others argued that the Bible being a guidance of every estate political, ecclesiastical, economical, says that thou shall not suffer a witch to live,[42] but to be executed in the same day wherein she is convicted, and this was a custom observed by the ancient fathers.[43] Thus because the origin of their beliefs was God's word as they understood it they started trials out with doubt

[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at Para. 46.

[42] *citing* Exodus 22:18.

[43] Roberts, *Treatise on Witchcraft*, Para. 5.

and worked to eliminate it through trial for the purpose of protecting themselves from evil.

d. The Judges Duty and Disposition

While the jury on the one hand retained the societal perceptions held prior to the trials, the judges were bound to convict. The judges played less of a dispassionate role in witch trials and stood quite like the modern prosecutor. They had no choice but to condemn once there was sufficient evidence of discontentment. The Judges therefore insisted on conviction in many cases. Their burden appeared to be to find witnesses who would testify to acts that show malice, envy, hatred or banning and cursing. Evidence of these is contained both in the Salem witchcraft papers[44] and in paragraph 78 of the Treatise of Alexander Roberts, where it was stated that:

> "the judge and civil magistrate was bound by virtue of that office and superiority in the common-wealth to purge and free that place, in and over which he hath command of all malefactors, which if he do neglect, then he is a double offender, against the law both of Justice and Charity; for he is obliged by duty to foresee (so much as in him lies) that the public state should be secured, which it concerns to have offenders punished, otherwise he makes himself partner with them in their outrages and offences and stands answerable for those damages sustained by the whole body of the people in general, or undergone by any particular of the same, for sparing of the wicked is hurting the good, and he that doth not repress and forbid evil (when it is in his power) doth countenance and maintain it."

The Salem trials are punctuated with instances in which the jury found cause to doubt the testimony of witnesses and entered a not guilty verdict but the Judges insisted on a conviction. The case of Rebecca Nurse is one of these.[45] When some witnesses testified to her visiting their sick child because the child was sick but then stated that the child who was thriving when she left, died as a result of her visit, the jury entered a verdict of not guilty. The Judge sent them back

[44] *See,* Edited, Introduction & Index by Paul Boyer, Stephen Nissenbaum. *The Salem Witchcraft Papers, vol. I, II & III, Verbatim transcripts of the legal documents of the Salem witchcraft outbreak of 1692.* Univ. of Va. Lib., Electronic Text Center. http://etext.virginia.edu/salem/witch-craft/texts/Boysal1.html.
[45] *Salem Witch Papers, Vol. II, Trial of Rebecca Nurse and Vol. III, list of persons to be executed.*

in to convict and the jury entered a verdict of "unclear". They did not enter a guilty verdict. The judge then sent Rebecca Nurse to Boston where she was convicted by the judges without a jury in a sought of appellate proceeding. The trial of William Barker is another example[46], aged 14 years, kept in prison from Aug. 1692 – May 1693, twice acquitted and on a third indictment, the Judge in the Court of Ipswich alleged that the minor had confessed before him in May 1693.On this third count, the jury entered a verdict of "unclear". Thus while the jury sought evidence to eliminate doubt, the judges sought ways by which to convict the accused persons.

II. Statutes

Both sects Protestant and Catholic used the Bible as the basis for governance once such an act or conduct was already provided for. Since the Bible[47] required that "Thou shall not suffer a witch to live", King Henry VIII made witchcraft a statutory offense.[48] In the reign of King Edward VI, King Henry's statute was repealed.

Queen Elizabeth I's statute replaced King Henry VIII's [49] Statute. Queen Elizabeth's statute was concerned with a witch's use of witchcraft in classifying the punishment. Queen Elizabeth's law[50] made witchcraft a felony punishable with death if used to cause the death of another. But if the use was to cause the waste or other bodily harm to another, it is punishable on the first count with imprisonment for one year as well as a quarter-annual public appearance in which you confess your sins to the hearing of all in the market place. On the second count, the

[46] *Id, Vol. I, Trial of William Barker.*
[47] Exod. 22:17.

[48] St. 33. H. VIII. c. 8.

[49] Repealed by the Operation of Stat. of 1. E. IV. C. 12.

[50] 5 Eliz. C. 15, 16.

witch would suffer death without clergy but would not forfeit her property.[51]

Interestingly, though the witch would not suffer death for using witchcraft to find things lost or stolen including gold and silver but would be imprisoned for life, with public appearances and his or her family would forfeit the witch's property.[52] Perhaps the reason is that if the witch can find treasures, then he or she must have amassed quite a bit for herself probably from the crown's stores or to which the Crown could benefit from collecting. Since knowledge of the whereabouts of future discoverable treasure cannot be obtained without the witch, it may have made sense to keep the witch alive and easily accessible by imprisonment.

King James I did not see a distinction between using witchcraft to cause bodily harm and finding lost or stolen things.[53] He merged the kinds of witch acts and made the punishment for the first time offender one year with public appearances and death on the second count and was not really interested in their treasures though he still imprisoned them for one year.[54] Perhaps it is this hard-line approach that brings King James I to mind each time one thinks of the witchcraft statutes, when in actual fact King Henry VIII was responsible for the first statute.

The witchcraft statute[55] provides for trial by jury as in any treason or felony case. The proviso to the Statute of James I requires "always that if the offender in any of the cases aforesaid shall happen to be a peer of this realm, then his trial therein to be had by his peers, as is used in cases of felony or treason, and not otherwise." Sir Francis Bacon Knight[56], His majesty's

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[51] *Id.,* section II.

[52] *Id.,* Section III.

[53] *1 Jac. I. c. 11, 12.* Section III.

[54] *Id.,* Section III.

[55] *Statutes of the Realm* (London 1817; repr. *The Statutes,* 3rd ed., London, 1950).

[56] *Cases of Treason*. Printed by the Assignes of John More, and the fold by Matthew Walbancke, and William Coke. London. Anno. 1641. Pp. 6.

Solicitor General codified the law on what amounted to treason, felony and misprison of treason. Witchcraft was listed among the cases of felony, so that where a man conjures, or invokes wicked spirits or commits murder, it is felony.[57]

According to Sir Francis Bacon, Felony did not allow right to counsel, nor was the accused allowed any witnesses who could justify his or her actions. It therefore appears that whatever requirements applied to any murder trials in 1641 would apply to witchcraft trials as well. The implication is that person's accused of witchcraft were not allowed right to counsel or witnesses who could justify their actions. There were then left to the power of perception of the jury to determine any inconsistency in the testimony of their accusers to establish doubt.

In *Commonwealth v. Webster* decided in 1850, the court stated that reasonable doubt among other principles of criminal law was one of a few obvious and well established rules. Well established does not mean, like Whitman says, the rule emerged after 1780 because that was the first [58]case in which a jury instruction contained the standard. In contrast to Whitman's method, Barbara Shapiro had found a 1777 case in which counsel, while addressing the jury requested that they should not convict if there is any doubt in their minds[59]. Applying this concept of searching for the word "doubt" in the trial records generally, rather than in Jury instructions, resulted in my discovering a 1617 case in which one John Guest of Bromsgrove, who was a common quarreler and disturber of the peace beat one Mrs. Hawes, on the ground that she was a witch and would bewitch him or set fire over his house or suborn one or other to lie in wait for him by the highways side to kill him", but Mrs Hawes was not indicted for witchcraft.[60] Thus reasonable doubt originated before 1617.

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[57] Bacon. *Cases of Treason. Pp. 9.*

[58] *Infra.*, footnote 69.
[59] *Infra.*, footnote 71.
[60] *Quarter Sessions Papers.* Pp. 141.

In Salem Massachusetts, Bridget Bishop, who was eventually accused and convicted of witchcraft in 1692 had been indicted, tried and acquitted in 1680 of witchcraft. At the time, the jury had not found sufficient evidence of discontent in the testimony of her conduct while operating a tavern. But apparently, they did in the 1692 trial. Some standard of doubt was applied in the first trial otherwise Bridget Bishop would have been convicted the first time, and Mrs. Hawes would have been indicted for witchcraft in 1617.

There is nothing in all the statutes that clarifies the ramifications of what would constitute witchcraft. Hence, there is and probably was then, a necessity to look outside the statutes themselves to see how the crime was perceived and enforcement of the law carried out. Considering especially that both statutes here analyzed, provide for a trial by jury of the accused persons' peers, one must look to what extrinsic guidance or instruction, the Judges and jury could have applied.

Since the trial transcripts do not contain jury instructions, the instructions that Christian Leaders like Alexander Roberts and John Atkins, who would probably be the Judges, jurors or doctors common, passed around to the Christian community in 1615 may suffice as a guide. This guide may show what must have been on the Judges minds and probably formed part of their instructions about what evidence was satisfactory, what witnesses were credible and what the elements of the crime were because the trial transcripts reveal that these tests were applied. This guide came from their beliefs which translated into the morality that afflicted interpretation of the law and determined the level of certainty that would satisfy the element of doubt whether we see them as reasonable or not. As the definition of reasonable doubt reproduced in the introduction shows, the standard for conviction of a criminal is proof beyond a reasonable doubt which means conviction to a moral certainty. The preceding were the factors that determined the

level of certainty morally applicable by the jurors.

B. Standard of Reasonable Doubt to a Moral Certainty

In the 1600's during the reign of King James I, magistrates had developed a procedure for situations where there was doubt and they were uncertain what to do.[61] In such situations, they would bind the accused over to good behavior pending the next quarter sessions.[62] One example is the 1625 case of John Kayse who was charged with speaking evil against dignitaries at an alehouse in Upton against a Justice of the Peace, Sir Henry Spiller.[63] Because the justices found it difficult to see the precise offense of which Kayse was guilty, they did what it appears was the practice when in doubt, and they were uncertain what to do.[64] They bound over Kayse to good behavior.[65] The language of uncertainty and doubt may have formed the basis for the modern day standard which requires proof beyond a reasonable doubt meaning conviction to a moral certainty.

The documentation of the procedure of what to do when in doubt seems to have been done in a memorandum by a knight, Sir Francis Egioke who was appointed to keep the peace on the 9th day of January in the 17th year of the reign of King James when he released one John Oakley of Hanbury.[66] Since King James took the throne in 1603, this must have been the year 1620. Egioke wrote that "If a magistrate was in doubt what to do with anyone brought before him, he was to order the accused to appear at sessions to answer the case against him."[67] One Magistrate, Edward Pytts wrote to the Clerk of the Peace that a person suspected of petit larceny

[61] *Calender of the Quarter Sessions Papers, Pp. 125.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Calendar of the Quarter Sessions Papers*, Pp. n45.
[67] *Id.*

had been brought before him without direct proof against the accused, one Peter Tyler, so the court bound the accused over to good behavior until the next quarter sessions.[68]

James Whitman[69] has attempted to trace the origins of reasonable doubt from a theological perspective but not its legal origins. Two years after Whitman, Theodore Waldman[70] wrote the primary work on the origins of the legal doctrine and believes the phrase to be the coinage of an early author who was trying to describe the various ways in which courts cautioned a jury's haste to convict, without considering whether they felt any doubt at all.

Barbara Shapiro cited to a 1777 statement made by Counsel to a jury in a case tried at the Old Bailey, that "if the evidence be such as irresistibly prove the crime, if you see any room upon the evidence to doubt of his being guilty, if you are not perfectly convinced you must find the accused not guilty.[71] Varied statements showing doubt in trials pervade Shapiro's article[72] and lead up to the phrase *reasonable doubt* as the doctrine is expressed in *Commonwealth v. Webster*.[73] Here the court stated what reasonable doubt was not.

Reasonable doubt is not mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.[74] Rather reasonable doubt is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an

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[68] *Id.*

[69] Whitman, James Q. *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial.*

[70] See, generally, Waldman, Theodore. *Origins of the Legal Doctrine of Reasonable Doubt*. Journal of the History of Ideas, Vol. 20, No. 3 (Jun. – Sep., 1959), pp. 299-316, Univ. of penn. Press.

[71] Shapiro, Barbara. *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries, 1600-1850. 38 Hastings L. J. 153 at 171-72.November 1986.*

[72] *Id.*

[73] 59 Mass. At 320. Supra. Page 1.

[74] *Id.*

abiding conviction to a moral certainty, of the truth of the charge.[75] Shapiro opines that moral certainty is an additive to the expression "reasonable doubt" merely included to attempt to give some precision to the meaning of the term.[76] She uses the expression moral certainty in common place sentences to attempt to explain its meaning.[77] These uses confuse the issue because a term like moral certainty would be unlikely to be used in common place lingo. A thorough search of 16th century literary dialogue, reveals that language describing truth and morality to any level of certainty can be traced to church sermons.[78]

It is more likely that the term moral certainty arose from the Moral Code and was reserved for proceedings at law and perhaps used in church sermons to caution against immoral behaviour. So that Shapiro's use of the term in the question "Are you morally certain that you came into the room before he did?" is only a way to arrive at the conclusion that being morally certain means being very certain.[79] Moral certainty is less about absolute certainty and has more to do with temporal law and the individual internal convictions of the jurors. In essence, "are you convinced in your mind that this person came into the room after you?" would probably be the more appropriate question when one is being tried for a temporal offense.

Moral certainty probably has more to do with a conscience driven individual conviction or belief than with mere physical certainty. Beliefs here are not limited to religion but to all convictions that may be founded on reason peculiar to the juror in question but based on the facts. This reasoning stems from the existence of a moral code as distinct from a criminal code

[75] *Id.*

[76] Shapiro. *To a Moral Certainty*, pp. 153.

[77] *Id.*

[78] *Sermons by Hugh Latimer, Martyr, 1555, Sometime Bishop of Worcester at 104.*

[79] *Id.*

which became enforceable sometime in the late 1500's.[80] In the 15th to 17th Century, morality was the language of the moral code as opposed to the criminal code, which established some temporal offences.[81] For instance in all places where the terms "certainty and morality are used in the quarter sessions papers, morals were used in reference to expected conduct.[82]

Prior to this period, during the process of purging canon law, King Henry VIII ensured that the canon law, provincial and legatine constitutions would only be continued if they were not repugnant to the laws statutes and customs of the realm of England.[83] "By canon law, a lay man was excluded from the office of spiritual judge, but by act of parliament at the reformation, it was indulged to doctors of law to exercise all manner of ecclesiastical jurisdiction and there were then, several *eminent laymen civilians at doctors commons* that are an honor to these preferments; some few places being in the hands of the clergymen that were bred civilians in the universities."[84] The archdeacon acted as Judge and had jurisdiction over temporal matters.

To put together a moral code, King Henry VIII had assembled a commission of 32 persons but their work was not completed when he died.[85] King Edward VI compiled the essays of his nominees, two Bishops, two divines, two doctors of law and two common lawyers to make a model of laws of the church called *Reformatio Legum Ecclesiasticarum* but these were still subject to the non-repugnancy requirement set by Henry VIII.

In reference to truth, certainty was used in church sermons and not necessarily in common parlance. For instance, in a sermon before his majesty King Edward VI of England, Hugh Latimer, Bishop of Worcester, preached at Westminster on the 15th day of March, 1549

[80] *See, Calender of the Quarter Sessions*, Pp. 146.
[81] *Id.*
[82] *Calendar of the Quarter Sessions Papers*. Pp. 104, 138, 146 etc.
[83] John Godolphin, 1617-1678, "*Repertorium Canonicum" or An abridgment of the Ecclesiastical Laws.* Pub. by Assigns of R. & E. Atkins for C. Wilkinson, Pub. London. Pp. n785.
[84] *Id.* at Pp. 787. 37 Hen. 8. 17.
[85] *Id.*, appendix pp. 2-3, n785.

that God confirmed the people's conscience "in a more perfect certainty of the truth…"[86] Not surprisingly, Hugh Latimer was one of the first to push for enforcement of church law. He made a suit to King Edward VI to restore unto the church, the discipline of Christ in excommunicating the notable offenders.[87] Subsequently, on November 14th, 1549, the Bishops complained to parliament of the great increase of immorality and represented their insufficient legal authority to punish vice, or to enforce the discipline of the church.[88] A Bill was in consequence, brought into parliament with a view to remedying the evils complained of but it did not pass into a law.[89] Subsequently, James I, after making the witchcraft statute stricter, gave both the witchcraft statute and the common prayer book undeniable authority which was confirmed by Act of Parliament in 1603.[90] The effect of this was to require greater conformity with religious practices than the puritans would have been uncomfortable with.

Steve Shepard a professor of law and the University of Arkansas[91] defined moral certainty as that form of certainty that any person is capable of achieving from an understanding of the nature of things, applying reason and thought to the testimony of others, along with personal observation and experience. Though Shepard's definition is well thought out, it may be disagreeable by his conviction that moral certainty stands in contrast to divine knowledge or metaphysical certainty. The reason being that in the Witchcraft cases, metaphysical certainty and divine knowledge influenced the elements to be perceived as sufficient to convict.

According to Shepard, the division between moral certainty and other forms of certainty

[86] Ed. Rev. George Lewis Corrie, B.D. for the Parker Society. *Sermons by Hugh Latimer, Sometime Bishop of Worcester, Martyr, 1555.* University Press. Cambridge, Pp. 104.
[87] Sermons of Hugh Latimer. Pp. 258.
[88] *Id. footnote 1.*
[89] *Id.*
[90] *Repertorium Canonicum,* Pp. n785.
[91] *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof have weakened the Presumption of Innocence.* 78 Notre Dame L. Rev. 1165 at 1177. May 2003.

became widely accepted among the literate classes of England in the 1600's, one of whom was Bishop John Wilkins.[92] More importantly, after an analysis of Wilkins work and a distinction between Moral Certainty and Judicial Certainty, according to Shepard "one might conjecture that the increasingly diverse venire pool led to an increased difference between the understanding of lawyer and lay juror on a host of fronts."[93] So that jurors were increasingly exposed to greater confusion over the notion of moral certainty.[94] Thus, it troubles the imagination to think of jurors determining the fate of persons accused with a capital offense to a moral certainty.

While in England, temporal law established an enforceable moral code, criminal law was to some extent separate. Some of the criminal law is however, based upon moral principle because undoubtedly, as a matter of history, it derived from Christian teaching.[95] Patrick Devlin makes a statement that encapsulates the perception of the jury or at least the expectation of the laws' reasonable man.[96] Devlin[97] asks the most troubling question about the expression moral certainty and which may have led to the convictions of the Salem Witch trials. He asks, "How are the moral [judgments] of society to be ascertained?"[98] He responds that though it would be impossible for the law-maker to obtain the individual assent of every citizen in order to ascertain what the moral judgment is at the time, it is not enough that lawmakers should reach conclusions

[92] *Id. at page 1178. Wilkins* was the Warden of Wadham College, Oxford and chaired the meeting for the founding of the Royal Society in 1660.

[93] Shepard at 1177.

[94] *Id.*

[95] Devlin, Patrick. *The Enforcement of Morals. Oxford Univ. Press,* London. 1965. Pp. 7.

[96] *Id., pp. 15.*

[97] *Id. at 14-15.* It should be noted that Devlin was trying to set out the circumstances in which the state should exercise its power. In this case, the law making power and what influence this may have on the enforcement of the law.

[98] *Id.,* Devlin. *The Enforcement of Morals* at 14.

based on the opinion of the majority.[99] This is important because Christians were the majority at the time of the passing of the witchcraft statutes. Devlin then stated that:

> "English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgment may be largely a matter of feeling. It is the viewpoint of the man on the street- or to use an archaism familiar to all lawyers- the man in the *Clapham omnibus*. He might also be the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous… Parliament…did not think of themselves as making law but simply as stating principles which every right-minded person would accept as valid. It was what Pollock called practical morality, which is based not on theological or philosophical foundations but in the mass of continuous experience half consciously or unconsciously accumulated and embodied in the morality of common sense. He called it also a certain way of thinking on questions of morality which we expect to find in a reasonable civilized man or a reasonable Englishman, taken at random.[100]

This seemed to be the perception of the members of society in the colonies of England including Salem village in the state of Massachusetts. So that the Salem juror was not expected to be the rational man, rather he is only the reasonable man, who is not really expected to reason about anything, though he may and whose judgment may be largely a matter of feeling. He was the man on the streets of Salem who was carrying around perceptions taught to him and ideas held from the norms of his then society. Thus he was not looking for scientific evidence, only proof of whatever constituted the crime presented for him to determine based on his normative values. Normative values that journeyed from England in 1628 to America and remained with the people who become jurors in 1692.

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[99] *Id.*

[100] Devlin. *The Enforcement of Morals*, pp. 15.

C. Factual History of Salem

The Danvers Historical Society, Danvers, Massachusetts published in 1923 retains a good record of the history of Salem.[101] Salem's history as a town dates from about the year 1633.[102]The territory then called Salem comprised of Beverly, Manchester, Wenham, Marblehead, Danvers, Peabody, Middleton, part of Topsfield and the town still called Salem.[103] Reports had reached England through men engaged in the fishing industry that there was an excellent opportunity in the region of Cape Ann for fishing and farming.[104]

In 1628, John Endecott, with the Dorchester Company set sail from Dorchester, England.[105] They met the early settlers called the "Planters" prominent among who was Roger Conant who built the first house.[106] Before embarking on the journey from England, John Endecott had been elected governor of the new colony. He had legal papers which conveyed to six men in his party, all the land included in the present Essex county and portions of Norfolk, Suffolk and Middlesex. John Endecott, like most of the other one hundred Puritan settlers that he led across the seas from England to a settlement north of Plymouth colony which would later be known as Salem, had lived in England during part of the reformation from 1588-1665.[107]

The Puritans[108]

The history of the English Puritans is almost the same as that of the Protestant

[101] Tapley, Harriet Silverster. *Chronicles of Danvers (old Salem Village) Massachusetts, 1632-1923.*

[102] *Id.*, Pp. 3.

[103] *Id.*, Pp. 2.

[104] Tapley. *Chronicles of Danvers*. Page 1.

[105] *Id.*, Pp. 2

[106] *Id.*

[107] Http://www.mass.gov/?. Http://historical.ha.com/common/auction/catalogprint.php.

[108] Byington, Ezra Hoyt. *The Puritan in England and New England*. Pub. By Roberts Bros. Boston, 1896.

reformation in England.[109] About the year 1564, the word puritan began to be used to designate those who sought the purest form of worship - *religio purisima*.[110]The Spanish ambassador writing to Philip said: "Those who call themselves of the *religio purisima* go on increasing."

They are styled puritans because they allow no ceremonies nor any forms save those which are authorized by bare letter of the gospel."[111] I would suppose that such a text would be Exod. 22:17; "Thou shall not suffer a witch to live". Their religion was spread to them by a door to door reading of pamphlets.[112] Because King James I would not permit any changes to the form of worship in the church, much sought after by the puritans who preferred a pure form of religion bound only by the bible, the settlement of New England began.[113] Puritans were religious countrymen who had their desires set on the ways of God and to enjoy His ordinances.[114]

Salem Witch Trials

In 1692, twenty-nine trials for witchcraft were held in the courts in Boston, Ipswich and Salem which at the time were part of the area that constituted part of Salem, Massachusetts. Of these twenty-nine trials, nineteen persons who refused to confess to witchcraft were tried and convicted. Of the nineteen, three had at least one "not guilty" verdict and when the jury refused to convict because there was doubt in their minds, the jury entered an "unclear" verdict, and the judges had these persons executed anyway. These accusations of witchcraft and questionable convictions were the mishaps suffered by failure of the judicial system.

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109 *Id., pp. 6.*

110 *Id., pp. 15.*

111 *Id., pp. 17.*

112 *Id., pp. 7.*

113 *Id., pp. 49.*

114 *Id., pp. 53.*

A standard of reasonable doubt was applied by the jury in the Salem Witch trials, but the system of justice whereby the Judges acted as prosecutors failed the people of Salem. Since the Puritan's were religious countrymen[115] complying with a law that required the fulfillment of God's word in the Bible - that a witch should not be allowed to live, may have been more plausible for them.

The people of Salem, having moved from England had ties to towns like Norfolk from whence the letters explaining the confession and execution of Marie Smith arose. This is more plausible because the doctrine of the Puritans was passed around by writings to the Christian Community as Alexander Roberts letters stated. Some of this doctrine formed the moral principles upon which Salem's criminal law including its witchcraft law was based. And if MacCormick's normative order is a basis for thinking about what is right and wrong, then these doctrines became concrete norms that infiltrated the law and became concrete elements of the crime of witchcraft. In essence, to Devlin's question "how are the moral judgments of Salem to be ascertained?" the answer would probably not be tied so much to the people as to the doctrines. For instance, it has been postulated that one of the reasons why John Proctor was hung was because he had neglected to attend prayer meeting and was regarded as a backslider[116] and a backslider is more susceptible to discontentment and therefore to witchcraft.

If Devlin is to be believed when he says that the reasonable man in a jury is not to be confused with a rational man, then it should stand to reason that since the viewpoint of the man on the Salem street would be that absence from Church was proof of ungodliness and ungodliness was proof of witchcraft, then John Proctor for instance, ought to have been hanged.

[115] Here religious countrymen means persons who had their desires set on the ways of God and to enjoy His Ordinances.

[116] Gemmill, William Nelson. *The Salem Witch Trials: a chapter of New England History. A.C. McClurg & Co.,* Chicago, 1924; http://galenet.galegroup.com/servlet/MOML. Pp. 166.

This is more so when one looks to the banning and cursing "element" or characteristic that the witch was supposed to manifest. When John Proctor's wife, Elizabeth was arrested for witchcraft on April 11th 1692, John Proctor purportedly followed and resented many insults hurled at his wife by the judges[117]. I would think that if a man were helpless to use his hands, he might hurl a few curses for good measure himself. This would make him the next candidate for witchcraft immediately, and it did. He was immediately arrested and placed in irons.

While Devlin postulates that the juror is not expected to reason about anything and his judgment may be largely a matter of feeling, the conclusion may be that if feelings were the test, then it would be a very communally controlled feeling. Because Devlin's argument assumes that life in the 16th Century had little value and would be inconsistent with the then Governor pardoning Rebecca Nurse or the jury acquitting William Barker, and refusing to enter a guilty verdict thus using the meaningless expression "unclear". Take the trial of Susanna Martin held on June 28, 1692[118] for instance. She was a Seventy-two year old woman who laughed at her accusers. When Abigail Williams testified that the accused was "Goody Martin who had often hurt her", Susannah Martin laughed.[119] 'Goody' ironically was still used as a prefix to the names of all women, whether accused of witchcraft or not. For a jury comprised of people not given to ceremonies, watching this apparent display of callousness must have been shocking. Susannah Martin responded, "Well I may at such folly. I never hurt this woman or her child." To which Mercy Lewis cried out "She hurts me and she pulls me down," then Susanna Martin laughed again.

Even though she may have laughed out of nervousness, Susanna Martin's trial portrays

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[117] *Id.*

[118] *Id.*, at pp. 114-130.

[119] *Id.* at 114.

the picture of an unsympathetic accused person when in fact the jury ought to have seen her for the feeble old lady that she was. A potential reason for her laughter may be her realization that her life was over once accused of witchcraft because like other felony trials she was not entitled to counsel, no one was allowed to testify on her behalf, and her word could not be taken as true because being in contract with the devil she would know scripture and deceive the court like John Atkins wrote to Alexander Roberts. Though this is pure conjecture, perhaps Susannah Martin had no intention of continuing to live in the squalor of the prisons and might have perceived death as some sweet release from torture.

It may be understandable if the jury were offended by Martins attitude because like Devlin said, the jury might also be the right-minded person. Would it have been right-minded in the wake of a witchcraft trial to seek evidence other than of the elements read to the Puritans as part of their doctrines? Since the tests in the letters of Alexander Roberts and John Atkins were almost strictly applied in Salem, it is more likely than not that the letters were in fact passed around to the Christian community. These jurors would have believed that being old, dull and slow witted was not the only characteristic of witches therefore a person amused in the face of death could also be a witch.

There was a recurring question in the trials that had little or no effect in aiding the accused persons. "Do you think they are bewitched?" or "Do you not think it is witchcraft?" Whether the witness answered, "I do not think they are" like Susanna Martin did, or answered "It is an evil spirit, but whether it be witchcraft I do not know!" like Mary Easty[120], a fifty-eight year old mother of seven made no difference. Even Mary Easty stating that "Before Jesus [she was]

[120] *Id.,* at pp. 142-147.

free"[121], made no difference to a Christian jury and one would wonder why the name of God would not move these puritans to tamper justice with mercy. This too is understandable if any stock is to be placed in the letters of Alexander Roberts which stated that even the devil can speak the name of Jesus Christ and should not be believed.

Upon reading the trial of Susanna Martin, she may have decided in her old age that once accused, a person would be convicted and hung. The Judge said to her "God will discover you if you be guilty." To which she responded "Amen, amen, a false word will never make a guilty person". But there was no verification of the falsity or truthfulness of the statements against the accused.

Judges Hathorne and Corwin sat in judgment over those accused and carried out their duty as prosecutors as stated under Roberts Christian doctrines, to the letter. Under these doctrines, the Judges duty was to purge Salem of all malefactors and if he neglects this duty, then he is a double offender, against the law both of Justice and Charity. [122]If this obligation is not met so that the public state should be secured then the judge makes himself partner with the witches in their outrages and offences and stands answerable for any damages sustained by the people in general because sparing the wicked is hurting the good, and he that does not repress and forbid evil when within his power tolerates and maintains it.[123] Quite a heavy burden for the judges to bear and shows cause for their acting as prosecutors.

This may explain the saddest trial of all- that of Rebecca Nurse.[124] Rebecca Nurse was examined for witch marks while in prison by a jury of women. The jury found her not guilty though they reported that they found "certain unnatural marks" upon her body. The Spectators

[121] *Id.,* at pp. 143.

[122] *Treatise of Alexander Roberts.*
[123] *Id.*
[124] Gemmill, *The Salem Witch trials.* Pp. 131.

demanded a guilty verdict and the jury retired back into the jury room and came back with a verdict of guilty. The Judge then sentenced Rebecca Nurse to be hung on July 19th 1692. But even the governor of Salem at the time, was convinced of her innocence and issued a pardon. The crowd surrounded the governor's house and threatened him. He revoked the pardon and poor Rebecca Nurse was hung until dead on July 19th. In this case, the duty of the Judge ought to have been to accept the Jury's verdict but the Judge being a puritan took up his role as purger of the society probably fearing that if he does not comply with the cries of the crown, he would be a double offender himself.

The Judge applied the standard of the feeling juror who does not reason rationally when he said "It is fearful for all to see these things, and you, an old person contracting with the devil, and yet to see you standing there with dry eyes when there are so many wet ones. You should do well if you are guilty to confess and give glory to God".[125] The accounts do say that the court read the reports of the preliminary examination to the jury before sending them in to deliberate. What is withheld in all the trials is the instruction that went with the reading of those preliminary examinations and the content of those examinations. We can only guess at their content.

However, simply not finding an instruction from the trials of that era does not conclusively mean, that the Jurors did not seek proof beyond some level of doubt. Balancing the burden that the Puritan was charged not to convict the innocent as well as not to suffer the witch to live and with Roberts's description of a witch, the Jurists admitted that regular standards for determining the commission of the crime of witchcraft could not be used. Since, like the Supreme Judicial Court of Massachusetts points out, reasonable doubt is not mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some

[125] Gemmill, at Pp. 133-134.

possible or imaginary doubt, disallowing testimony of specters would probably have been perceived as some "possible or imaginary doubt" that was not strong enough to impeach the evidence of witchcraft as presented.[126] The reasoning at the time was that because the devil taught these witches art that is such a hidden mystery of wickedness that the secrets of the witches cannot be discovered, unless they confess voluntarily or by being made to do so by order of justice, their crime could not be proved.[127] Accordingly their crime can only be proven by (i) those that have knowledge or (ii) those who have suffered by the sundry mischief's done by those accused unto others, (iii) by impartial testimonies upon oath, and (iv) by vehement presumptions confirmed, or else communicated unto the judges in the learned treatises.[128] The presumption then was more likely that reasonable doubt could be satisfied if the questions that were asked established knowledge or manifestation of the sundry mischief done to the witnesses.[129]

A second look at the definition of reasonable doubt reveals that, since the circumstances taken as a whole were required to exclude every other hypothesis to a moral certainty, then as long as the individual mind of each juror was left in a condition that they could say they felt an abiding conviction of the truth of the charge, then the standard was met. On the other hand, if any weight is to be placed in Devlin's work, it is questionable whether the jury understood moral certainty in the same way that the law defines it today. Because Devlin had said that the increasingly diverse venire pool in the 1600's led to an increased difference between the understanding of lawyer and lay juror on a host of fronts including the notion of moral certainty.

Moral judgment of society could only have been ascertained through a written code,

[126] *Commonwealth v. Webster (Supra).*
[127] Treatise of Alexander Roberts.
[128] *Id.*
[129] *Id.*

which though could not have been assented to by each individual citizen, the reasonable man, the man in the *Clapham ominibus* or what the man sitting in the jury box might after discussion hold to be the society's moral code. Thus for every juror at the time, bound by his religious beliefs, like Pollock said, practical morality which is based not on theological or philosophical foundations but in the mass of continuous experiences half consciously or unconsciously accumulated and embodied in the morality of common sense, determined what would be accepted as satisfying that moral conviction to such certainty that reasonable doubt would be dispelled by the evidence in the mind of any reasonable civilized man taken at random. Since the experiences of the 1600's reveals a belief in rampant encounter with evil, pamphlets testifying to the existence of the evil of witchcraft, how to convict and what to look for, like those of Alexander Roberts, convictions for witchcraft and executions in the news would lead a reasonable jury to unconsciously have accumulated and embodied these beliefs in his morality of common sense.

It is this same 17th Century "reasonable civilized man" like John Endecott who travelled in 1628 to Salem, Massachusetts and settled becoming governor of the new colony. Not surprisingly, when testimony of discontent was presented to the jury in Massachusetts after being riddled with tales of witchcraft and the judges duty bound to prosecute, conviction was the logical end to the lives of those accused and the standard of reasonable doubt as understood by the then jury was applied.

Still bothersome though, is the fact that the witness's testimony upon oath was not impartial. The witnesses were mostly neighbors who had quarreled with these so called witches. Perhaps because the depth of evil was so unsearchable, sundry facts by even the most partial witnesses was admitted. However, the fact that Bridget Bishop was acquitted at her first trial

may show that the jury thought themselves to have been convinced beyond some doubt by the evidence of discontentment they heard.

Bridget Bishop was an urban woman born in an ancient era. Her generation could not have condoned her. She owned a drinking tavern on the road between Salem and Beverly which was regarded as "nothing less than a drunken and disorderly resort, very offensive to the better people of the village".[130] She had been tried for witchcraft and acquitted in 1680. Why she did not leave the town is surprising because she ought to have known that the number of enemies she had, would surely have gotten her convicted on a second charge. A jury of nine women examined Bridget Bishop like they did Rebecca Nurse, and did not find any markings on her on the second examination. Hence, she apparently passed the physical evidence test.

How then was the court convinced to a moral certainty? Since moral certainty translates into the beliefs of the jurors, a juror who feels that a person is a witch would be more than certain in his mind that any testimony of malice, envy, hatred or banning and cursing would dispel any doubt. He would feel certain that he had failed in his duty not to let a witch live, if he were to let the witch go. This is probably the reason why the jury was so eager to convict, except for the cases of Rebecca Nurse, William Barker and one other.

One important thing to note is that none of the convicts were given the benefit of imprisonment as first time offenders because they were all accused of causing the death of children of their accusers. In the case of Rebecca Nurse, she had visited one of her accuser's sick children and advised that the child was suffering something unnatural. Her words were used against her when the child died and the doctor's treatment failed. The parents testified that their child had been thriving until her visit even though they had said she had visited him as a sick

[130] Gemmill, Pp. 54.

child. The inconsistency seemed to fly by the erudite judges but did not elude the jurors hence the original finding of not guilty.

CONCLUSION

In conclusion, it assumes more than history reveals at the moment that the reasonable doubt standard was not applied in the 1600's simply because we have found no jury instruction to that effect. If anything, the fact that the jury was applying the standard gives the impression that it was a standard initiated by temporal judges, improved by the jury and re-adopted by the judges after the jury began finding ways to apply it.

The standard must have been in existence before 1615. Since in England, before 1603, there was a moral code distinguishable from a criminal code which established temporal laws but the people, meaning the clergy and lay doctors common, rather than the crown may have had a greater influence on creating the elements for proving the temporal offences and subsequently proof of witchcraft.

In light of Puritanism and stewardship, witchcraft as prescribed under the statute of King James I more likely than not was, proved with heed to some standard of doubt before a jury in England as well as in Salem.

Hence in the United States today, the difficulty of applying the reasonable doubt standard with the moral certainty test lies in the origins of that test arising from a system of government that merges church and state when the United States does not.